Ravindran a/l Kandasamy v Public Prosecutor

HIGH COURT (PULAU PINANG) — CRIMINAL APPEAL NO 42A-117 OF 2008
CHEW SOO HO JC
9 OCTOBER 2009

Criminal Law — Corruption — Corruptly receiving gratification — Appellant arrested with trap money — Whether trial judge correct in assessment of evidence — Whether trial judge misdirected herself when she accepted evidence under soliciting charge to convict appellant of charge of accepting — Whether complainant and ACA officer were accomplices or trap witnesses — Whether trap witnesses could corroborate each other — Whether there was sufficient corroborative documentary evidence — Anti-Corruption Act 1997

Criminal Procedure — Sentence — Appeal against sentence — Whether fine imposed by trial judge in error — Anti-Corruption Act 1997 s 16(b)

The appellant, a police lance corporal attached to the Bukit Mertajam police station ('the police station'), was the police personnel in charge of the drug rehabilitation programme at the police station. He was charged with corruptly soliciting gratification under s 10(a)(bb) of the Anti-Corruption Act 1997 ('the Act') and also for obtaining gratification under s 11(a) of the Act. The prosecution's case was based on the complaint of a convicted drug dependant ('the complainant'), who was released from a drug rehabilitation centre on 14 November 2003. As a condition for his release the complainant was required to report to the police station within 72 hours of his release, ie on or before 17 November 2003. The complainant alleged that when he reported at the police station on 17 November 2003, he met the appellant who had asked him a lot of questions and then proceeded to provide assistance to the complainant for cash or such items as a computer or a handphone with a camera. When the complainant left the police station on 17 November 2003, no file was opened on him. Then again on 17 December 2003, when the complainant reported to the police station, where he met the appellant for the second time, the appellant reiterated that if the complainant were to do as the appellant asked he would be free and his name would not be recorded in the computer. The appellant again allowed the complainant to leave without a file being opened, with the complainant allegedly given an extension of time to 20 January 2004 to find the money. On 12 January 2004, the complainant lodged a complaint with the Anti-Corruption Agency ('ACA'). On 14 January 2004 an ACA officer ('the ACA officer') posing as the complainant's business partner was introduced to the appellant. On 20 January 2004, trap money of RM2,000 was given to the

ACA officer to proceed with the trap. The complainant, the appellant and the ACA officer met in a computer shop and then moved onto a coffee shop because the appellant found the computers to be too expensive. At the coffee shop the appellant had been informed that the complainant had brought along RM2,000 with him but that he needed RM200 for himself. At that point the appellant had allegedly replied that he would take RM1,700 and proceeded to hand over one of two envelopes to the ACA officer to put the money into. When the ACA officer had put RM1,700 into the envelope, the appellant had kept the money. He had then handed over two documents from the second envelope, which he stated were the original of the complainant's documents, and instructed the complainant to tear them up. After the torn pieces were put back into the envelope, the appellant told the complainant that he was free to go and need not report to the police station anymore. The two envelopes, one with the trap money and the other with the torn pieces of documents, were retrieved from the appellant when he was arrested at the coffee shop. In short it was the prosecution's case that the payment of RM1,700 was received by the appellant as an inducement to forebear from registering the complainant as a drug dependant on the records thereby allowing the latter absolute freedom to move around as he pleased.

At the end of the prosecution case the sessions court judge acquitted and discharged the appellant on the first charge but called for the appellant's defence to the second charge. The appellant's defence was that he had allegedly paid RM1,700 to the complainant on 17 December 2003, the second occasion when he met the complainant at the police station, to buy a computer and that on 20 January 2004 when the complainant took him to the computer shop to look at all the models of laptops displayed he found them all too expensive and asked for a return of the money he had paid to the complainant. The appellant also alleged that he did not register the complainant under the rehabilitation programme on 17 November 2003, the first time he reported at the police station because the complainant had not brought his green card along with him. The trial judge found the appellant's version of the events that took place in the coffee shop to be riddled with inconsistencies and the defence of the appellant to be unconvincing, implausible and highly unlikely in respect of the second charge. The appellant was found guilty of the second charge and sentenced to three months imprisonment together with a fine of RM8,500. This was his appeal against that conviction and sentence. In his appeal the appellant submitted that the trial judge had misdirected herself when she accepted the evidence under the soliciting charge ('the first charge') to convict the appellant of the charge of accepting ('the second charge'). In reply the prosecution submitted that the evidence of the first charge was relevant as it formed the transaction as to why the complainant lodged his complaint against the appellant. The appellant further submitted, inter alia, that the trial judge was wrong to find that the complainant and the ACA officer were not accomplices or trap witnesses and that their evidence required no

corroboration and that she had failed to test the defence evidence with that of the prosecution in deciding the defence case.

Held, dismissing the appeal:

(1) Upon a perusal of the whole evidence it was found that no prima facie case was established as to warrant the defence to be called on the first charge because the facts showed that the appellant was soliciting for money or any other items such as a computer laptop and the court could not convict the appellant based on these two versions. However, subsequent evidence showed that there had been a request for a computer but that the appellant had settled for a payment of RM1,700 which formed the second charge. In the circumstances, the second charge could be sustained independently without reference to the soliciting charge (the first charge). Further, from the trial judge's grounds of judgment, it was found that the judge had not based her findings on the first charge to convict the appellant on the second charge and there was no misdirection in this respect. There was a series of events coupled with the fact that there had been an earlier demand for cash by the appellant which led to the trap and the ultimate payment of RM1,700 and its acceptance by the appellant, which were relevant to the facts in issue of the second charge (see para 15).

(2) The sessions court judge was right in coming to the finding of fact that both the complainant and the ACA officer were not accomplices. However the trial judge erred in not holding the ACA officer to be a trap witness. The ACA officer held a vital role as he was required to give the trap money to the appellant at the appropriate time and to signal to his colleagues to make an arrest. The complainant who took an active part in the trap and who triggered the trap by the ACA was also a trap witness. As such the trial judge had misdirected herself when she held that the complainant and the ACA officer, who were trap witnesses, could corroborate each other in evidence. However, there was independent corroborative evidence that the trial judge had duly considered. This was the trap money of RM1,700 in marked notes which led to the irresistible conclusion that that the appellant received money from the ACA officer and the torn pieces of official documents relating to the complainant. All these documentary evidence were found by the trial judge to be independent corroborative evidence and she was right. Thus, although there was a misdirection on the corroboration in that a trap witness could not corroborate another trap witness, there was sufficient corroborative documentary evidence which corroborated the evidence of the complainant and the ACA officer (see paras 23–24).

(3) The trial judge had applied the correct law and had given her reasons before arriving at her decision that the appellant had failed to raise a reasonable doubt in the prosecution's case and there was no reason to disturb those findings (see para 27).

(4) The appellant's submission that the documentary evidence was inadmissible because the makers were not called had no merit (see para 28).

(5) The minimum fine as prescribed under s 16(b) of the Act is RM10,000 and thus the fine of RM8,500 imposed by the trial judge was clearly in error. The sentence as to the fine was therefore varied to that of RM10,000 and in default one month imprisonment (see para 31).

[Bahasa Malaysia summary

Perayu, seorang lans koperal yang berkhidmat di stesen polis Bukit Mertajam ('stesen polis tersebut'), merupakan kakitangan polis yang bertanggungjawab untuk program pemulihan dadah di stesen polis tersebut. Dia telah dituduh menawarkan wang suapan secara korup di bawah s 10(a)(bb) Akta Pencegah Rasuah 1997 ('Akta tersebut') dan juga kerana memperoleh wang suapan di bawah s 11(a) Akta tersebut. Kes pendakwaan adalah berdasarkan aduan seorang penagih dadah yang disabitkan ('pengadu'), yang telah dibebaskan dari pusat pemulihan dadah pada 14 November 2003. Sebagai syarat untuk pembebasannya pengadu dikehendaki membuat aduan di stesen polis dalam tempoh 72 jam selepas pembebasannya, iaitu pada atau sebelum 17 November 2003. Pengadu mendakwa bahawa apabila dia membuat laporan di stesen polis itu pada 17 November 2003, dia berjumpa dengan perayu yang telah banyak menyoalnya dan kemudian terus memberikan bantuan kepada pengadu dengan wang tunai atau barang-barang seperti komputer atau telefon bimbit berkamera. Apabila pengadu meninggalkan stesen polis tersebut pada 17 November 2003, tiada fail dibuka ke atasnya. Maka sekali lagi pada 17 Disember 2003, apabila pengadu melaporkan kepada stesen polis itu, di mana dia berjumpa perayu untuk kali kedua, perayu telah mengulangi bahawa jika pengadu berbuat sepertimana diminta perayu dia akan bebas dan namanya tidak akan direkodkan dalam komputer. Perayu sekali lagi telah membenarkan pengadu pergi tanpa membuka fail, yang mana pengadu dikatakan telah diberikan lanjutan masa sehingga 20 Januari 2004 untuk mencari wang tersebut. Pada 12 Januari 2004, pengadu telah membuat aduan dengan Badan Pencegah Rasuah ('BPR'). Pada 14 Januari 2004 seorang pegawai BPR ('pegawai BOR tersebut') yang menyamar sebagai rakan kongsi perniagaan telah diperkenalkan kepada perayu. Pada 20 Januari 2004, wang perangkap sejumlah RM2,000 telah diberikan kepada pegawai BPR tersebut untuk meneruskan dengan perangkap itu. Pengadu, perayu dan pegawai BOR tersebut telah berjumpa di kedai komputer dan kemudian beralih ke kedai kopi kerana perayu mendapati komputer itu terlalu mahal. Di kedai kopi perayu telah dimaklumkan bahawa pengadu telah membawa sejumlah RM2,000

bersamanya tetapi dia memerlukan RM200 untuk dirinya sendiri. Di saat itu perayu dikatakan telah menjawab bahawa dia akan mengambil RM1,700 dan seterusnya menyerahkan salah satu daripada dua sampul surat kepada pegawai BPR tersebut untuk memasukkan wang tersebut. Apabila pegawai BPR telah memasukkan RM1,700 itu ke dalam sampul surat itu, perayu telah menyimpan wang tersebut. Dia kemudian menyerahkan dua dokumen daripada sampul surat kedua, yang dikatakannya adalah dokumen-dokumen asal pengadu, dan mengarahkan pengadu mengoyakkannya. Setelah kepingan yang dikoyakkan itu dimasukkan balik ke dalam sampul surat, perayu memberitahu pengadu bahawa dia bebas untuk pergi dan tidak perlu membuat laporan lagi ke stesen polis. Dua sampul surat itu, satu dengan wang perangkap dan satu lagi dengan kepingan dokumen yang telah dikoyakkan, telah didapatkan semula daripada perayu apabila dia ditangkap di kedai kopi itu. Pendek kata ianya adalah kes pendakwaan bahawa bayaran RM1,700 telah diterima oleh perayu sebagai pendorong menahan diri daripada mendaftar pengadu sebagai penagih dadah atas rekod yang membenarkan pengadu kebebasan mutlak untuk bergerak sesuka hatinya.

Di akhir kes pendakwaan hakim mahkamah sesyen telah membebaskan dan melepaskan perayu atas pertuduhan pertama tetapi telah memanggil untuk pembelaan perayu terhadap pertuduhan kedua. Pembelaan perayu adalah bahawa dia telah dikatakan membayar RM1,700 kepada pengadu pada 17 Disember 2003, kejadian kedua semasa dia berjumpa pengadu di stesen polis, untuk membeli komputer dan bahawa pada 20 Januari 2004 semasa pengadu membawanya ke kedai komputer untuk melihat semua model komputer riba yang dipamerkan dia mendapati semuanya terlalu mahal dan meminta dipulangkan wang yang dibayarnya kepada pengadu. Perayu juga mengatakan bahawa dia tidak mendaftar pengadu di bawah program pemulihan pada 17 November 2003, kali pertama dia membuat laporan di stesen polis kerana pengadu tidak membawa kad hijau bersamanya. Hakim perbicaraan mendapati versi perayu tentang kejadian-kejadian yang berlaku di kedai kopi amat tidak konsisten dan pembelaan perayu tidak meyakinkan, tidak dapat dipercayai dan tidak mungkin berkaitan pertuduhan kedua. Perayu didapati bersalah terhadap pertuduhan kedua dan menjatuhkan hukuman tiga bulan penjara bersama denda RM8,500. Ini adalah rayuan terhadap sabitan dan hukuman. Dalam rayuannya perayu berhujah bahawa hakim perbicaraan telah salah arah apabila dia beliau menerima keterangan di bawah pertuduhan penerimaan ('pertuduhan pertama') untuk mensabitkan perayu dengan pertuduhan menerima ('pertuduhan kedua'). Sebagai jawapan pendakwaan berhujah bahawa keterangan pertuduhan pertama adalah relevan kerana ia membentuk transaksi kenapa pengadu membuat aduannya terhadap perayu. Perayu selanjutnya berhujah, antara lain, bahawa hakim perbicaraan terkhilaf kerana mendapati bahawa pengadu dan pegawai BPR tersebut bukan rakan sejenayah atau saksi perangkap dan bahawa keterangan mereka tidak memerlukan sokongan dan bahawa beliau telah gagal untuk menguji

keterangan pembelaan dengan pendakwaan dalam memutuskan kes pembelaan itu.

Diputuskan, menolak rayuan:

(1) Setelah meneliti keseluruhan keterangan adalah didapati bahawa tiada kes prima facie telah dibuktikan bagi mewajarkan pembelaan dipanggil atas pertuduhan pertama kerana fakta-fakta menunjukkan bahawa perayu telah menerima wang atau apa-apa barang lain seperti komputer riba dan mahkamah tidak boleh mensabitkan perayu berdasarkan dua versi tersebut. Walau bagaimanapun, keterangan berikutnya menunjukkan bahawa terdapat permintaan untuk sebuah komputer tetapi perayu telah bersetuju dengan bayaran RM1,700 yang membentuk pertuduhan kedua. Dalam keadaan berikut, pertuduhan kedua boleh dikekalkan secara berasingan tanpa rujukan kepada pertuduhan penerimaan (pertuduhan pertama tersebut). Selanjutnya, berdasarkan alasan-alasan penghakiman hakim perbicaraan, adalah didapati bahawa hakim tersebut tidak mengasaskan penemuan beliau atas pertuduhan pertama untuk mensabitkan perayu atas pertuduhan kedua dan tiada salah arah berkaitan ini. Terdapat siri kejadian berserta fakta bahawa terdapat tuntutan terdahulu untuk wang tunai oleh perayu yang membawa kepada perangkap itu dan bayaran terakhir RM1,700 dan penerimaannya oleh perayu, yang relevan dengan fakta-fakta yang menjadi isu kepada pertuduhan kedua (lihat perenggan 15).

(2) Hakim mahkamah sesyen adalah betul dalam membuat penemuan fakta bahawa kedua-dua pengadu dan pegawai BPR tersebut bukan rakan sejenayah. Walau bagaimanapun hakim perbicaraan telah terkhilaf kerana tidak memutuskan yang pegawai BPR tersebut adalah saksi perangkap. Pegawai BPR tersebut memegang peranan penting kerana dia dikehendaki memberikan wang perangkap kepada perayu pada masa yang sesuai dan untuk memberi isyarat kepada rakan-rakannya untuk membuat tangkapan. Pengadu yang mengambil bahagian aktif dalam perangkap itu dan yang mencetuskan perangkap oleh BPR adalah juga saksi perangkap. Olleh itu hakim perbicaraan tersalah arah apabila beliau memutuskan bahawa pengadu dan pegawai BPR, yang merupakan saksi-saksi perangkap, boleh saling menyokong dalam keterangan. Walau bagaimanapun, terdapat keterangan sokongan berasingan yang telah dipertimbangkan oleh hakim perbicaraan. Ia adalah wang perangkap RM1,700 dalam nota-nota bertanda yang membawa kepada kesimpulan yang kukuh bahawa perayu telah menerima wang daripada pegawai BPR tersebut dan kepingan dokumen-dokumen rasmi yang telah dikoyakkan berkaitan pengadu. Kesemua keterangan dokumentar tersebut didapati oleh hakim perbicaraan sebagai keterangan sokongan

berasingan dan beliau adalah betul. Oleh itu, meskipun terdapat salah arah tentang sokongan bahawa saksi perangkap tidak boleh menyokong saksi perangkap lain, terdapat keterangan sokongan dokumentar yang mencukupi bagi menyokong keterangan pengadu dan pegawai BPR tersebut (lihat perenggan 23–24).

(3) Hakim perbicaraan telah menggunakan undang-undang yang betul dan telah memberikan alasan-alasan beliau sebelum tiba kepada keputusannya bahawa perayu telah gagal menimbulkan keraguan munasabah dalam kes pendakwaan dan tidak ada sebab untuk campur tangan penemuan-penemuan tersebut (lihat perenggan 27).

(4) Hujah perayu bahawa keterangan dokumentar tidak boleh diterima kerana tidak dipanggil adalah tidak bermerit (lihat perenggan 28).

(5) Denda minimum sepertimana ditetapkan di bawah s 16(b) Akta tersebut adalah RM10,000 dan oleh itu denda RM8,500 yang dikenakan oleh hakim perbicaraan jelas tersilap. Hukuman berhubung denda dengan itu telah diubah kepada RM10,000 dan jika gagal satu bulan penjara (lihat perenggan 31).]

Notes

For cases on appeal against sentence, see 5(1) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 3342–3392.

For cases on corruptly receiving gratification, see 4 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 97–100.

Cases referred to

Adzhaar bin Ahmad & Anor v PP [1996] 4 MLJ 85, HC (distd)

Khoo Cheng Huat v PP [1991] 1 MLJ 42, HC (distd)

Looi Kow Chai & Anor v PP [2003] 2 MLJ 65; [2003] 2 AMR 89, CA (refd)

Mat v PP [1963] MLJ 263, HC (refd)

Ng Kok Lian & Anor v PP [1983] 2 MLJ 379 (refd)

PP v Chettuveilu a/l Nan (Shah Alam High Court Criminal Appeal No 42A-10 of 2004; 42A-18 of 2004) (distd)

PP v Datuk Haji Harun bin Haji Idris (No 2) [1977] 1 MLJ 15, HC (refd)

PP v Yuvaraj [1969] 2 MLJ 89, PC (refd)

Ramli bin Sutu v PP [1998] MLJU 323; [1998] 5 CLJ 671, HC (folld)

Ramly bin Md Yasin & Ors v PP [1982] CLJ 200, HC (refd)

Rattan Singh v PP [1971] 1 MLJ 162, HC (refd)

Teja Singh & Mohamed Nasir v PP [1950] MLJ 71, HC (refd)

Thavanathan a/l Balasubramaniam v PP [1997] 2 MLJ 401; [1997] 3 CLJ 150, SC (folld)

Legislation referred to

Anti-Corruption Act 1997 ss 10(a)(bb), 11(a), 16(b), 42, 42(1), 44
Evidence Act 1950 ss 5, 6, 7, 8, 9
Prevention of Corruption Act 1961 (repealed) ss 14, 18

Athimulan (Athimulan & Co) for the appellant.
Fariza bt Hamzah (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Chew Soo Ho JC:

FACTS OF THE CASE

[1] The appellant was initially charged with two charges of corruptly soliciting gratification under s 10(a)(bb) and for obtaining gratification under s 11(a) of the Anti-Corruption Act 1997 Act 575 ('the Act'). At the end of the prosecution's case, the appellant was acquitted and discharged on the first charge of corruptly soliciting gratification while his defence was called on the second charge which is reproduced as follows:

> Bahawa kamu pada 20 Januari 2004 jam lebih kurang 3.50 petang di Medan Selera Top One, Jalan Tembikai, Bukit Mertajam, di dalam Daerah Seberang Perai Tengah, dalam Negeri Pulau Pinang, sebagai ejen kerajaan Malaysia, iaitu Lans Koperai bernombor RF 92126 yang bertugas di pejabat Ketua Polis, Ibu Pejabat Polis Daerah Seberang Perai Tengah, Bukit Mertajam telah secara rasuah memperolehi bagi diri kamu satu suapan, iaitu wang tunai sebanyak RM1,700.00 daripada seorang Mansur bin Mohamad (K/P No: 750719–02–5835) sebagai dorongan bagi diri kamu untuk melakukan suatu perbuatan yang berhubungan dengan hal ehwal principal kamu iaitu tidak membuka fail pengawasan ke atas Yusoff bin Omar (K/P No: 590609–07–5081) yang dikenakan perintah pengawasan di bawah Akta Penagih Dadah (Rawatan dan Pemulihan) 1983, dan dengan ini kamu telah melakukan satu kesalahan di bawah Seksyen 11(a) Akta Pencegahan Rasuah 1997 (Akta 575) dan boleh dihukum di bawah Seksyen 16 Akta yang sama.

[2] The appellant gave evidence on oath and at the end of the defence, he was found guilty and convicted and was sentenced to three months imprisonment together with a fine of RM8,500. Hence, he appeals against his conviction and sentence.

[3] The fact disclosed that the complainant ('SP5') upon his release from the drug rehabilitation centre at Pusat Tahanan Serenti, Batu Kurau, Perak on 14 November 2003 was required, as a condition for his release, to report to the National Anti Drug Agency ('the ADK') and the Bukit Mertajam police station within 72 hours of his release which was on 17 November 2003.

[4] On 17 November 2003 SP5 accordingly reported himself to the ADK and subsequently to the Bukit Mertajam police station. The appellant was the police personnel in charge of the drug rehabilitation programme at the said police station where SP5 reported to on 17 November 2003. On this first encounter, appellant asked SP5 a lot of questions of the terms and conditions of SP5's impending supervision and whether SP5 was able to adhere to them. SP5 expressed that he had no choice as it was the court's order but asked whether the appellant could relieve his burden as his job dealing with direct selling required him to often leave the restricted area in order to canvass sales. The appellant was willing to help if SP5 could give what he/appellant wanted and he promised that thereafter, SP5 would be free to go anywhere he wanted as SP5's name would not be recorded in the official record of the police station as one who was required to undergo rehabilitation. SP5 stated that the appellant then wrote the figure of 2,000 on a chit of paper to him. When SP5 asked whether it could be reduced, the appellant wrote again on a chit the sum of 1,800. SP5 then asked for time to consider as he had just been released and did not have money. In addition, the appellant also asked SP5 what else he could give and SP5 said that he could offer items such as computer or a handphone with camera. The appellant then asked for SP5's telephone number and wrote it down on the form that SP5 had brought along when reporting to the appellant. No file was opened on SP5 and SP5 was allowed to leave.

[5] On 17 December 2003, SP5 reported to the ADK and then to the Bukit Mertajam police station where he met the the appellant for the second time. The appellant asked SP5 of the previous conversation. SP5 apologised saying that he had no money and requested that his file be opened for which he would abide by the instructions and procedure. The appellant then pulled SP5 out of his room and said to SP5 that if SP5's file was opened, SP5 would be in trouble because the appellant would instruct his police personnel to see him everyday and to disallow him to leave the area covered by his police station. SP5 then requested to defer the matter to enable him to find the money. The appellant agreed and extended the time to 20 January 2004. The appellant reiterated that if SP5 were to give in to what he wanted, it would ease SP5 to do his work as SP5 would be able to go where he wished and his name would not be recorded in the computer. On this second occasion, SP5 was again allowed to leave without his file being opened by the appellant.

[6] On 12 January 2004, SP5 lodged a complaint to the then Anti-Corruption Agency ('ACA').

[7] On 14 January 2004, an ACA officer, SP2, was assigned to pose as SP5's business partner to accompany SP5 to report to ADK and then to the Bukit Mertajam police station to basically observe what had transpired. The appellant was not in the police station but SP5 managed to contact the

appellant who turned up about 10 to 15 minutes later. The appellant invited SP5 to an adjacent shop to discuss the matter. Inside that shop, SP2 was introduced to the appellant as SP5's business partner. The appellant asked SP5 to inform him when money or the items that SP5 had mentioned earlier was ready.

[8] On 20 January 2004, a brief meeting was held by SP3, an ACA officer, with the attendance of SP5, SP2 and other ACA officers who were to make the arrest that day. Trap money of RM2,000 was handed over to SP2. The appellant was contacted that morning but since he was on duty, the meeting was scheduled in the afternoon. At about 2pm, SP5 and SP2 went to a computer shop in Seberang Jaya where they were joined by the appellant 10 to 15 minutes later. SP5 invited appellant to enter the said shop to find out which computer appellant wanted or what he wanted. The appellant said that the computers were too expensive and asked what SP5 had brought along. SP5 responded that they had brought cash. The appellant then invited SP5 and SP2 to a coffee shop in a food court in that area. The accused asked again what they had brought along with them. SP5 informed that they had RM2,000 cash but he needed RM200 to replace his punctured tyres. The appellant magnanimously asked them to give him RM1,700. He took out two envelopes and gave one to SP2 to put the money into it. SP2 retrieved RM300 from the RM2,000 trap money and placed the remaining RM1,700 into the envelope. The appellant kept the money. From the other larger envelope that the appellant held, he took out two documents and handed over to SP5 saying that they were the original of SP5's documents. He asked SP5 to tear them into pieces while the appellant proceeded to tear up the remaining two documents that he took out from the same envelope. Following that, the appellant instructed SP5 to put all the torn pieces back into the envelope and declared that SP5 was free to do whatever he liked and to go wherever he wanted. He further promised that SP5 did not need to report to ADK anymore. Having completed that deal, both SP5 and SP2 left. SP2 then sent a missed call to another ACA officer to signal that the transaction was completed whereupon the arresting officer, SP4 together with other ACA officers approached the appellant at the table and arrested the appellant. The trap money in an envelope together the torn pieces of documents in the other envelope were retrieved from the appellant.

[9] Upon the above evidence at the end of the prosecution's case, the sessions judge had found that the prosecution had established a prima facie case and thus, the defence was called.

[10] The appellant's defence is that SP5 had made the offer to sell him a computer at wholesale price as he was told that SP5 was an agent selling computers; this was on their first encounter on 17 November 2003. On the

second occasion on 17 December 2003, SP5 asked for payment of RM1,700 being the price for the computer and appellant gave the sum to SP5 who would obtain the computer as soon as possible. On the third occasion on 14 January 2004, the appellant received a telephone call from SP5 saying that he had brought along a friend with him and they later met at the Bukit Mertajam police station where the appellant was introduced to SP2. According to the appellant, SP2 asked him what type of computer he wanted and he replied he wanted a good brand. SP5 then told the appellant that he would receive his computer on 20 January 2004. In the afternoon of 20 January 2004, the appellant met SP5 at a computer shop in Jalan Tembikai as prearranged in the morning via telephone. At the appointed shop, the appellant saw SP5 outside the shop and they both went into the said shop where he saw SP2 sitting at a table inside. The appellant then looked at the various brands of computers in the shop and realised that they were all too expensive. He then told SP5 that he wished to abort the purchase and asked for the refund of his money. Instead of returning him the money, SP5 invited him for a drink at a nearby coffee shop in the food court across the street. At the coffee shop, SP5 showed the appellant some computer catalogues but the appellant remarked that the prices were too expensive and still wanted his money back. SP5 then asked SP2 to return the money to the appellant. According to the appellant, he had at that time placed his diary on the table. There were several envelopes with letters within his diary. SP2 took one of the envelopes and placed the money into it before passing it to the appellant. The appellant took the envelope with the money and kept them in his shirt pocket. Meanwhile, SP5 took some of the letters placed under the appellant's diary and he suddenly tore those letters. According to the appellant, he warned SP5 that it was an offence and asked SP5 to follow him back to the police station where he would lodge a report. The appellant collected the torn pieces into the envelope from the floor. By then, SP5 and SP2 had walked away from the table. Soon after, the appellant was arrested by ACA officers and the money was retrieved from him.

THE FINDINGS OF THE SESSIONS JUDGE

[11] The sessions judge found that the defence of the appellant had failed to raise a reasonable doubt and found the appellant guilty as charged on the following grounds, inter alia:

(a) The court finds that SP5, the complainant, is a truthful and credible witness;

(b) The role of SP2 and SP5 is not that of an accomplice. SP2 played a minor role to merely listen, observe and to hand over the trap money when the time was right as directed by his superior. SP2 was also not a trap witness as defined in *Ramli bin Sutu v Public Prosecutor* [1998] MLJU 323; [1998] 5 CLJ 671 and his evidence can be accepted

without corroboration. SP5 was prepared to comply with the terms and conditions of the restriction order and to report to ADK and the police station. It was the appellant who asked for money or any other items from SP5. SP5 was reluctant to give any bribe to the appellant but was threatened by the appellant that he would check on SP5 everyday if SP5 refused. This prompted SP5 to lodge the report to the ACA. On a finding of facts, SP5 was held not to be an accomplice; *Ng Kok Lian & Anor v Public Prosecutor* [1983] 2 MLJ 379 is referred;

(c) On corroboration, the court finds that SP2, the ACA officer who posed as SP5's business partner and SP5 corroborated each other in material particulars. The discovery of marked notes from the appellant was independent corroborative evidence; see *Ramly b Md Yasin v Public Prosecutor* [1982] CLJ 91 so was the envelope containing the torn pieces of court order and related documents pertaining to SP5's terms and conditions of restriction;

(d) The payment of RM1,700 was received as an inducement to forbear from registering SP5 as a drug dependent on the records thereby allowing SP5 absolute freedom to move around as he pleased;

(e) It is strange and unreasonable that the appellant would have the inclination to buy a computer or laptop from SP5 who is a convicted drug dependent undergoing rehabilitation on the first occasion when SP5 reported to the police station on 17 November 2003;

(f) The appellant did not register SP5 under the rehabilitation programme and allowed SP5 to leave without taking any documentation from him under the pretext that SP5 did not bring the green card;

(g) The appellant allegedly paid RM1,700 to SP5 on the second occasion when SP5 came to report to the police station on 17 December 2003. There was no receipt for the payment, no discussion of the price, the type of laptop except that it must be a good brand and no plausible reason why the appellant trusted SP5 so much as to hand over a large sum of money to the latter;

(h) From 17 December 2003 to the date of arrest on 20 January 2004, SP5 had never contacted the appellant over the sale of computer or laptop and the appellant was not perturbed though he had allegedly handed over a large sum of money to SP5; the appellant had also not obtained any contact details of SP5;

(i) On the appellant's defence that on the day of his arrest, he had gone to the computer shop with SP5 to look at all the models of laptops displayed; when he found all were very expensive, he immediately wanted his money back. Grave doubt has arisen why the appellant

would give the money to SP5 and ask for a good brand but one month later he came to a computer shop to look at models of computers;

(j) The appellant's version of the event that took place at the food court was riddled with inconsistencies. The appellant said SP2, the ACA officer, counted the money, took an envelope from in between the appellant's diary, put the money into the envelope and then handed it over to him. There is no necessity for an elaborated step to surreptitiously place the money into an envelope. Surprising, the appellant took the money without even counting it as any ordinary person would do;

(k) It is strange that the appellant just happened to have the court order and other related documents pertaining to SP5 produced as exhs P6(a), (b) and (c) which SP5 tore up when he met SP2 and SP5 at the food court. The appellant must have given SP5 the permission to tear those official documents; otherwise SP5 would not dare to do so in front of a police officer. Though tearing of official documents was a very serious matter, yet the appellant did not even attempt to arrest SP5;

(l) The defence of the appellant was found to be unconvincing, implausible and highly unlikely;

(m) Applying *Mat v Public Prosecutor* [1963] MLJ 263, the defence has failed to raise a reasonable doubt and that the prosecution has proved its case beyond reasonable doubt.

THE APPEAL

[12] The petition of appeal raises many grounds but at the time of argument of this appeal by both parties before this court, they have been deduced to the following:

(a) Evidence of the first charge for which the appellant has been acquitted and discharged at the end of the prosecution case should not be considered by the court in deciding and convicting the appellant on the second charge;

(b) Sessions judge was wrong to find that SP2 and SP5 were not accomplices nor trap witnesses thereby requiring no corroboration and the credibility of these two witnesses;

(c) Sessions judge was wrong in law in automatically invoking the presumption under s 42(1) of the Anti-Corruption Act 1997;

(d) Sessions judge had accepted highly prejudicial and inadmissible evidence in arriving at a prima facie case and in arriving at her findings at the end of the defence case;

(e) Sessions judge had admitted exhs P6(a), (b), (c) & (d), P12(c), P17, P25 which are inadmissible as the makers were not called; and

(f) Sessions judge had failed to test the defence evidence with that of the prosecution in deciding the defence case and in arriving at the appellant's conviction.

[13] On the first ground, learned counsel for the appellant submitted that the learned sessions judge had misdirected herself when she accepted the evidence under the soliciting charge (which is the first charge) to find the appellant guilty on the charge of accepting the gratification (the second charge) citing in support the case of *Adzhaar bin Ahmad & Anor v Public Prosecutor* [1996] 4 MLJ 85 at pp 91–92; *Public Prosecutor v Chettuveilu a/l Nan* (Shah Alam High Court Criminal Appeal No 42A-10 of 2004; 42A-18 of 2004). In *Adzhaar bin Ahmad*'s case, His Lordship Alauddin J (as he then was) referred to the case of *Khoo Cheng Huat v Public Prosecutor* [1991] 1 MLJ 42 where His Lordship Joseph Jr J (as he then was) said at p 45:

> The question of critical substance therefore was whether, having regard to the particular circumstances of this case, the learned president was right in convicting the appellant of the charge of acceptance, having acquitted him of the charge of soliciting, the very sum he had allegedly accepted — an acquittal against which the prosecution had not appealed and the correctness of which they were bound to accept. The maxim *res judicata pro veritate acceptur* is no less applicable to criminal than to civil cases (see *Sambasivam v The Public Prosecutor, Federation of Malaya* [1950] MLJ 145).
>
> It is trite law that an appellant may have his conviction quashed on the ground that the verdict against him was inconsistent with his acquittal on another count, if it can be demonstrated that the inconsistency is such that it would not be safe to allow the verdict to stand (see *R v Hunt* (1968) 52 Cr App R 580, per Lord Parker CJ).
>
> It was, therefore, most material for the learned president to have recognised — but clearly she did not — that the appellant having been acquitted on the charge of soliciting, he was entitled to be taken as innocent on that charge. The learned president should then have gone on to warn herself — but clearly again she did not — that as no reliance could be placed on those parts of the evidence of the complainant and his wife which related to the charge of soliciting, of which he had to be taken as an innocent person, she had to consider to what extent she could rely upon those parts of the evidence of these witnesses in so far as it related to the charge of accepting.
>
> It seems to me that it was imperative for the learned president to have adopted this approach when evaluating the evidence both for the prosecution and the defence and that had she done so, I cannot confidently say that she would, inevitably, have convicted the appellant on the charge of accepting, having regard to the particular circumstance of this case.

In omitting, therefore, to direct herself as aforesaid, and in consequence, in omitting to reject the testimony of the complainant and his wife in its entirety, the learned president had misdirected herself seriously, on the facts, and on this ground alone the conviction cannot stand.

[14] The learned DPP replied that the evidence of the first charge is relevant as it forms the transaction as to why the complainant, SP5, lodged his complaint or report. She cited the case of *Thavanathan a/l Balasubramaniam v Public Prosecutor* [1997] 2 MLJ 401; [1997] 3 CLJ 150 and submitted that the conduct of the appellant is a relevant fact under s 8 of the Evidence Act 1950 ('the EA').

[15] The cases of *Khoo Cheng Huat* and *Adzhaar bin Ahmad* are with respect distinguishable from their respective facts with the fact of the instant appeal as the charge of soliciting and accepting the gratification in both *Khoo Cheng Huat*'s case and *Adzhaar bin Ahmad*'s case pertain to the same amount of money that was solicited and that was accepted. It would be inconsistent in law and in fact if the accused is acquitted for soliciting the same amount of money but is found guilty for accepting the same amount which he has been found not to have solicited and thus innocent. In any event both the aforesaid cases cited by learned counsel do not suggest the proposition that once an accused is acquitted of the charge of soliciting, the conviction on the charge of accepting can never stand but that the court must warn itself when evaluating the evidence of the case so that no reliance could be placed on those part of the evidence of the complainant and the prosecution witness or witnesses which relates to the charge of soliciting: per His Lordship Edgar Joseph Jr J (as he then was) in *Khoo Cheng Huat*. To say it in other words, if the court has based its conviction of the accused for accepting on the evidence of the charge of soliciting which he has been acquitted, such conviction may be wrong if the court has not warned itself about relying on such evidence. Each case must, however, depend on its own facts. In the instant appeal, the fact shows that appellant was soliciting for money or any other items such as a computer laptop but the first charge specifically stipulated soliciting for cash of RM1,800 where there is no clear evidence that the appellant was alleged to have solicited for such an amount except the word of the complainant, SP5, who said that the appellant allegedly wrote the figure of 2,000 on a piece of paper and when SP5 asked whether it could be reduced, the appellant wrote 1,800. There is nevertheless no corroboration as the piece of paper with those figures was not produced in court. In addition, there was also evidence of payment in kind such as a computer laptop. Though the learned sessions judge did not state her grounds at the end of the prosecution case when she acquitted and discharged the appellant on the first charge (p 80 of the appeal record), it was upon a maximum evaluation of the evidence following *Looi Kow Chai & Anor v Public Prosecutor* [2003] 2 MLJ 65; [2003] 2 AMR 89. Upon perusal of the whole

evidence, I agree that no prima facie case was established to warrant the defence to be called on the first charge as the court cannot convict the appellant basing on two versions whether it is cash of RM1,800 as per the first charge or it is a laptop that was solicited if the appellant were to elect to remain silent. However, subsequent evidence shows that there has been a request for computer laptop or any other kinds which ultimately settled for a payment of RM1,700 which forms the second charge. Viewed in that respect, the second charge can be sustained independently without reference to the soliciting charge. Reading the learned sessions judge's grounds of judgment, this court finds that she has not based her finding on the soliciting charge to convict the appellant but the fact that there had been an earlier demand by the appellant which led to the ultimate trap and ultimate payment of RM1,700. This is a series of events coupled with the fact of there being a demand in cash or in kind is relevant to the fact in issue of the second charge ie the payment of the RM1,700 and the acceptance thereof and is permissible. In *Thavanathan a/l Balasubramaniam v Public Prosecutor*, the Federal Court has held, inter alia, that:

Held: ...

[2a] The cardinal rule relating to evidence is that, subject to the exclusionary rules, all evidence which is sufficiently relevant to the facts in issue is admissible. Therefore, on the question posed, ie without reference to any particular evidence, the answer is in the affirmative provided the evidence on the charge of soliciting is properly admissible on the trial of the charge of accepting, and it is so admissible if it satisfies the law of evidence relating to relevancy which, in the present context, are principally ss 5, 6, 7, 8 and 9 of the Evidence Act 1950, unless the exclusionary rules eg rules relating to hearsay apply.

[16] Indeed, from the facts of this appeal, the earlier fact when the complainant SP5 first met the appellant and the various subsequent acts of the appellant which led SP5 to finally lodge his complaint to the ACA are relevant under of the EA as such facts are relevant facts to the facts in issue (s 5), such facts are connected with the facts in issue to form part of the same transaction (s 6), such facts are the occasion or the cause of the facts in issue (s 7), such facts show the previous conduct of the appellant (s 8) and such facts explain or introduce the facts in issue. From the grounds of judgment, I do not find that the decision of the learned sessions judge to be based on the soliciting charge to arrive at the conviction of the appellant. The case of *Public Prosecutor v Chettuvellu a/l Nani* is distinguishable in the sense that the learned sessions judge there has found the credibility of the two key prosecution witnesses SP5 and SP7 to be unworthy but in this instant appeal, there was no such finding.

[17] Consequently, following *Thavanathan*'s case, I find that there is no misdirection on the part of the learned sessions judge in this ground.

[18] In respect of the second ground, learned counsel for the appellant submitted the learned sessions judge was wrong in law in coming to her finding that SP2 and SP5 are not accomplices. He contended it is also wrong for the sessions judge to hold that SP2 who gave the trap money to the appellant was not a trap witness and that it is a serious misdirection to hold that SP2 and SP5 corroborated. As to the credibility of these two witnesses, learned counsel submitted that the learned sessions judge has failed to evaluate and appreciate their evidence at the end of the prosecution case and at the end of the defence case. The learned sessions judge merely said she believed SP2 and SP5. The learned DPP in drawing the attention of this court to the learned sessions judge's grounds of judgment at pp 116–125 of the appeal record submitted that the learned sessions judge had considered the role of both witnesses and their credibility and had found their evidence to be credible. She also contended that provision of s 44 of the Act applies even if the witnesses are construed as accomplices. On corroboration, learned DPP submitted that the torn pieces of official documents produced as exhs P6(a) and P6(b) constitute sufficient corroboration.

[19] In discussing the issue of whether a witness is an accomplice pursuant to the old s 18 of the Prevention of Corruption Act 1961 which provides:

> Notwithstanding any rule of law or written law to the contrary, no witness shall, in any trial or inquiry as is referred to in section 17, be presumed to be unworthy of credit by reason only of any payment or delivery by him or on his behalf of any gratification to an agent or member of a public body.

[20] His Lordship Syed Agil Barakbah J (as he then was) in *Rattan Singh v Public Prosecutor* [1971] 1 MLJ 162 said:

> Though the word 'accomplice' does not appear, this section modifies the law and practice not as to accomplices generally, but only as to a specified class of accomplices so that a witness who is an accomplice only by reason of making a corrupt payment is not presumed to be unworthy of credit (see *Soosay Dass v Public Prosecutor* [1951] MLJ 57). If, however, he has played a more active part in the transaction apart from the bare payment, he is not protected by the section and the ordinary rules as regards accomplices apply (see *Daimon bin Banda v Public Prosecutor* [1953] MLJ 23).

[21] In *Teja Singh & Mohamed Nasir v Public Prosecutor* [1950] MLJ 71, Spenser Wilkinson J concluded the following views:

> I think the law is correctly stated in the case of *Emperor v Chaturbhuj Sahu* where the head note reads as follows:
>
> > A person who makes himself an agent for the prosecution with the purpose of discovering and disclosing the commission of an offence, either before associating with wrong doers or before the actual perpetration of the offence is not an

> accomplice but a spy, detective or decoy whose evidence does not require corroboration, though the weight to be attached to it depends on the character of each individual witness in each case. But a person who is associated with an offence with a criminal design, and extends no aid to the prosecution till after its commission is an accomplice requiring corroboration.

[22] His Lordship then went on formulate the law on accomplice as follows:

> If the witness has made himself an agent for the prosecution, before associating with the wrong doers or before the actual perpetration of the offence, he is not an accomplice; but he may be an accomplice if he extends no aid to the prosecution until after the offence has been committed.

[23] The role of SP2 who was instructed by his superior to act as a business partner of SP5, the complainant, to observe what transpired between appellant and SP5 and ultimately to pay the trap money, following the principle of law in *Rattan Singh*'s and *Teja Singh*'s cases, is not that of an accomplice as he did not play any active role apart from giving the trap money. It is a fact that SP5 did not pay the trap money to the appellant. He participated in the trap as arranged by the ACA after he had lodged his complaint to the said authority. Evidence shows that he had directly and indirectly refused to pay the money for simple reason that he had no money; he was prepared to abide by all the terms and conditions of his restriction and supervision order and when he was so 'threatened' by the appellant, he then asked for time to consider and then lodged his report. To be an accomplice, the complainant must have the *animus* to partake the crime. If the complainant has all along refused to do so and upon his report or complaint to the ACA which then sets a trap to make the payment of trap money and which directs the complainant to play his role in the trap, the fact that complainant partakes in such a role as directed does not change the fact that he has no *animus* to partake the crime to make him an accomplice. This court finds that the learned sessions judge is right in coming to the findings of facts that both SP2 and SP5 were not accomplices. There is therefore no need to invoke s 44 of the Act in relation to the evidence of an accomplice or an *agent provocateur*.

[24] On the question of whether SP2 is a trap witness, the learned sessions judge has considered that SP2 may probably be a trap witness noting that she has to warn herself in such circumstances that it is not safe to convict the appellant in the absence of corroboration. However, she found that the role of SP2 cannot be compared to the role played by the complainant in the case of *Ramli bin Sutu v Public Prosecutor* [1998] MLJU 323; [1998] 5 CLJ 671 but without drawing the distinction between the two to show in what respect that she meant the difference in their respective role. In *Ramli bin Sutu*, His Lordship Tee Ah Seng J held, inter alia, that 'A trap witness is an interested

party and his evidence must be corroboration. A trap witness also cannot corroborate another trap witness'. Basically, the role played by SP2 was minimum which the learned sessions judge held that SP2's evidence can be accepted without corroboration. Though she had not held directly that SP2 is not a trap witness, by the fact that she said that SP2's evidence can be accepted without corroboration would indirectly spell out that SP2 is not a trap witness. To this court, in a case where a trap is set to pay the bribe money to an accused person and to subsequently arrest him, any person who participated in the trap whether he played an active role or a passive role, so long that he subsequently testifies as a witness in court of whatever that transpired in the course of the trap, the payment of the trap money and the arrest etc will be construed as a trap witness. If a witness is able to narrate the events that transpired in the trap, it matters not the role he played whether an active or a passive role. I am of the view that SP2 indeed played a vital role when he was able to give the trap money to the appellant at the appropriate time and to signal to his colleagues to make the arrest after he had done so. This is the whole basis of the second charge. I am unable to agree with the view of the learned sessions judge holding that by such role of SP2, he is not a trap witness. SP2 should be held to be a trap witness and his evidence would have to be corroborated. There is no finding by the learned sessions judge whether SP5 is also a trap witness which requires his evidence to be corroborated. SP5 took active part in the trap being the complainant who triggered the trap by the ACA. He is a trap witness. It would therefore be wrong to hold that SP2 and SP5 being trap witnesses can corroborate each other in evidence; see *Ramli bin Sutu*. There is a misdirection in this respect. Be that as it may, there is however independent corroborative evidence that the learned sessions judge had duly considered. The trap money of RM1,700 which is in marked notes was found from the appellant upon his arrest. This is independent corroborative evidence which led to one and only irresistible conclusion that the appellant received money from SP2; see *Ramly bin Md Yasin & Ors v Public Proecutor* [1982] CLJ 200. In addition, torn pieces of official documents relating to SP5's police supervision were recovered in an envelope from the possession of the appellant upon his arrest. These were produced as exhs P6(a)–(d) (torn pieces) and P10 (envelope). Evidence of both SP2 and SP5 shows that the appellant has asked SP5 to tear two copies of exh P6 and the remaining two copies were torn by the appellant himself and these torn pieces were subsequently put into a brown envelope (P10) which the appellant kept near him. In addition, SP12, the OCS of the Bukit Mertajam Police Station testified that the record book exh P24 reveals no record that SP5's name was registered as a detainee required to undergo supervision and the green file on SP5 was only opened on 16 February 2004 after the arrest of the appellant. All these documentary evidence were found by the learned sessions judge to be independent corroborative evidence to the evidence of SP5 and SP2. She is right to have so found. Thus, even if there is misdirection on the corroboration in that a trap witness cannot corroborate another trap witness, there is sufficient corroborative documentary evidence which corroborated the

evidence of SP2 and SP5 that the sum of RM1,700 trap money was given to the appellant, that SP5 and appellant had torn the official documents, the torn pieces were kept in an envelope which appellant retained and the evidence of SP5 that his name was not registered in the police station to require him to report monthly to the said police station.

[25] On the credibility of SP2 and SP5, the learned sessions judge had dealt at length with their evidence and found them to be credible. She had also considered the discrepancies but ruled them to be minor citing *Public Prosecutor v Datuk Haji Harun bin Haji Idris (No 2)* [1977] 1 MLJ 15. I find that the learned sessions judge did not err in her finding except as aforesaid as she has the benefit of hearing and seeing the demeanour of these witnesses.

[26] The third ground is the presumption under s 42 of the Act. Learned counsel for the appellant contended that the learned sessions judge is wrong to automatically invoke this section and she has also failed to consider the defence at the end of the defence case whether the evidence of the defence and SP2 has rebutted the presumption, inter alia. In *Public Prosecutor v Yuvaraj* [1969] 2 MLJ 89, as cited by the learned DPP, Lord Diplock in delivering the judgment of the Privy Council said at p 90–91 of s 14 of the Prevention of Corruption Act 1961 which is in pari materia with s 42(1) of the following:

> Where a defendant is charged with an offence under s 4(a) of the Prevention of Corruption Act 1961, to which s 14 also applied, the onus lies upon the prosecution to prove the first two factual ingredients of the offence viz. (1) that a gratification was paid or given to or received by the defendant and (2) that at the time of the payment, gift or receipt, he was in the employment of a public body. Upon proof of these two ingredients the existence of the third ingredients viz (3) that the gratification was paid or given or received corruptly as an inducement or reward for doing or forbearing to do an act in relation to the affairs of that public body, is to be presumed unless the contrary is proved.

[27] Hence, the third ingredient that the gratification was received or accepted corruptly as an inducement or reward for doing or forbearing to do an act in relation to the principal's affairs need not be proved by the prosecution but that this presumption will arise to shift the onus to the appellant to prove to the contrary on a balance of probabilities; *Public Prosecutor v Yuvaraj*. There is no dispute that the sum of RM1,700 in marked notes was found in the possession and the fact that appellant was a police lance corporal of PDRM attached to the Bukit Mertajam Police Station is not denied. Thus, the presumption under s 42(1) of the Act applies. The learned sessions judge has considered the defence case vide her grounds of judgment at pp 133–143 and the fact that the defence need to rebut the presumption on a balance of probabilities citing *Thavananthan Subramaniam v Public Prosecutor*. Having evaluated the defence's case in the light of the evidence of SP2 and SP5, she

concluded that the appellant had failed to rebut the presumption. She also went on to find as a whole whether the defence has raised a reasonable doubt in the prosecution case applying *Mat v Public Prosecutor* [1963] MLJ 263. The learned sessions judge has applied the correct law and had given her reasons before arriving at her decision that the appellant had failed to raise a reasonable doubt in the prosecution's case. I find no reason to disturb her findings.

[28] On the next ground that the exhs P6(a)–(d), P12(c), P17 and P25 are inadmissible evidence as the makers were not called, I find no merit in this ground as P6(a)–(d) were torn pieces kept in an envelope recovered from the appellant upon his arrest, P12(a)–(c) are the documents relating to SP5's release from Pusat Serenti taken by the investigating officer from the former, P17 was tendered by SP7 who was the one in charge of the record book and P25 was tendered by the maker SP13 who lodged this report about some police files being burnt.

[29] The last ground being the failure of the leamed sessions judge to test the defence's case with that of the prosecution's case. Learned counsel submitted that there was no justification on the learned sessions judge's findings that was purely on ground that the defence's version was not acceptable and that the sessions judge did not address the issue why the appellant, a police officer would ask a public to tear official documents. Learned DPP submitted otherwise referring to pp 133–143 of the grounds of judgment. Having perused carefully the findings of the learned vide pp 133–143, I find that the learned sessions judge has duly considered all the evidence of the appellant along with the relevant evidence of SP2 and SP5 as well as the issue of green card before she arrived at her conclusion. As to the contention that the learned sessions judge did not address the issue why the appellant, a police would ask a public to tear official documents, I find that the learned sessions judge has addressed the issue at pp 141 para D to 142 of the appeal record and come to a proper findings of facts. I find no reason to interfere with her proper findings of facts.

[30] In relation to the sentence of three months imprisonment and a fine of RM8,500 in default one month imprisonment, I find that it is not manifestly excessive in respect of the three months imprisonment imposed but in respect of the fine, s 16(b) of the Act reads:

> (b) a fine of not less than five times the sum of value of the gratification which is the subject matter of the offence where such gratification is capable of being valued or is of a pecuniary nature, or ten thousand ringgit, whichever is the higher.

[31] In other word, the minimum fine as prescribed under s 16(b) above is RM10,000. The fine of RM8,500 imposed by the learned sessions judge is clearly in error. I shall vary the fine to that of RM10,000 in default one month imprisonment.

[32] For the above reasons, this appeal is disallowed. Conviction is confirmed and the sentence is varied as above.

Appeal dismissed.

Reported by Kohila Nesan